# Weighing the Costs and Benefits of Mediating Estate Planning Issues Before Disputes Between Family Members Arise: The Scale Tips in Favor of Mediation

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## I. INTRODUCTION

Abraham Lincoln once wrote, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time."[1] Even during his time, Lincoln realized the value of mediation. Historically, however, "we have not followed . . . Lincoln's advice [very well]"[2] and have, accordingly, been described as a "litigious society."[3]

Despite our apparent predisposition to litigation, the rise of alternative dispute resolution mechanisms, such as mediation, has increased

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[1] PETER LOVENHEIM, MEDIATE, DON'T LITIGATE: HOW TO RESOLVE DISPUTES QUICKLY, PRIVATELY, AND INEXPENSIVELY—WITHOUT GOING TO COURT 3 (1989) (citing THE WRITINGS AND SPEECHES OF ABRAHAM LINCOLN 15 (Philip Van Doren Stern ed., 1961)).

[2] *Id.* Lovenheim noted, however, that many of those who flock to file lawsuits soon realize some of the "inefficiencies" of going to court, such as high legal costs and long delays waiting for their case to go to trial. *Id.* at 4.

[3] *Id.* at 3. "Today, we have more lawyers (713,000) and file more lawsuits (15 million per year), than any other country in the world. To the slightest point of conflict, our conditioned battle cry seems to be 'See you in court!'" *Id.*; *see also* LUCILLE M. PONTE & THOMAS D. CAVENAGH, ALTERNATIVE DISPUTE RESOLUTION IN BUSINESS 4 (1999) (observing that litigation has served as the most prominently used system for resolving disputes in the United States); JOHN H. WILKINSON ET AL., DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK 1 (Supp. 1999) (observing that, "[a]ccording to the President's Council on Competition, nearly 18 million new civil cases were filed in 1989 in the state and federal courts, nearly 1 lawsuit for every 10 adults," and that the number of cases filed each year in the federal courts has nearly tripled in the past 30 years, "from about 90,000 in 1960 to more than 250,000 in 1990").

dramatically over the recent years.[4] By many accounts, mediation provides an effective tool against issues such as "unrealistic expectations" that prevent parties from reaching agreement.[5] Accordingly, mediation has been used to resolve disputes in a host of settings, ranging from the elder law to the securities industry.[6] Surprisingly, although estate planning disputes occur often,[7] commentators note that the practice of mediating estate planning issues before disputes arise between family members "is in its infancy."[8] Although information pertaining to the use of such mediation is limited, this Note attempts to demonstrate that mediation can, as it has in other settings, perform a meaningful role in this emerging practice.

Specifically, this Note analyzes mediation's role within the context of estate planning.[9] It argues that mediation, among other things, produces

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[4] *See* DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 4–5 (1996); MARGARET C. JASPER, THE LAW OF DISPUTE RESOLUTION: ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION 23 (1995) (noting the use of mediation in numerous areas, including disputes involving contracts, securities, domestic relations, construction claims, labor-management relations, and consumer complaints); PONTE & CAVENAGH, *supra* note 3, at 89 (stating that "[m]ediation is perhaps the fastest growing form of alternative dispute resolution . . . in business today."); Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 397 (1997).

[5] Michael D. Donahue & Susan H. Tregub, *Nuts and Bolts of NASD Mediation, in* SECURITIES ARBITRATION 1999: SETTLEMENTS, LAPTOPS, EXPERTS & ARBITRATORS 645, 649 (PLI Corporate Law and Practice Course Handbook Series No. B-1131, 1999) (arguing that "incidental issues" and attorneys who lack training in "find[ing] avenues of accord" adversely affect settlement negotiations).

[6] *See, e.g.*, Gary, *supra* note 4, at 397 (when disputes arise in probate matters); Donahue & Tregub, *supra* note 5, at 648 (describing mediation's role in securities industry disputes).

[7] *See, e.g.*, John A. Gromala, *The Use of Mediation in Estate Planning: A Preemptive Strike Against Potential Litigation*, CAL. TR. & EST. Q. (Fall 1996), *available at* http://adrr.com/adr2/estate.htm.

[8] *Id.* (asserting that the time has come "for the Estate Planning Bar to consider recommending professional mediators as part of the scope and quality of service they offer their clients" and that "[d]ialogue between estate planners and mediators as well as continuing education seminars focusing on mediation in estate planning should be a high priority").

[9] "The term 'estate planning' is sometimes criticized as being over-used . . . ." REGIS W. CAMPFIELD, ESTATE PLANNING AND DRAFTING v (2d ed. 1995). However, commentators observe that "no other term describes as well the process by which individuals arrange their affairs in an orderly way for management during life and for disposition during life and/or after death." *Id.*; *see also* ROBERT J. LYNN, INTRODUCTION TO ESTATE PLANNING IN A NUTSHELL 1 (4th ed. 1997) (noting that "'[e]state [p]lanning' is applying the law of property, trusts, wills, future interests, insurance, and taxation to the ordering of one's affairs, while keeping in mind the possibility of retirement and the

unique client-driven solutions, improves client satisfaction, and acts as a preemptive strike against potentially costly litigation. Moreover, this Note demonstrates that statistical data, where available, support these outcomes. Statistical data provide empirical evidence that mediation works. Part II describes and examines the estate planning process. Part III discusses the "traditional" approach to resolving estate planning and other types of disputes. Part IV analyzes the role of mediation in estate planning, by defining mediation, highlighting its benefits, and evaluating its use in other areas of the law. Additionally, Part IV discusses the need for mediating estate planning issues and analyzes the potential costs and benefits of mediating such issues before actual disputes arise between family members. Finally, Part V determines whether clients should mediate estate planning issues.

## II. ANALYZING THE ESTATE PLANNING PROCESS

### A. *Defining Estate Planning*

Estate planning has been defined as "the process by which the client plans the accumulation, management, conservation, and disposition of his estate so that he and his beneficiaries will derive the maximum benefit during his lifetime and after his death."[10] An effective estate planning process requires the estate planning team not only to coordinate, but also to integrate a client's personal, financial, and business concerns.[11] Accordingly, to plan a client's estate effectively, the estate planner usually possesses a certain level of skill and expertise.[12]

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certainty of death," and that the term "is often used as a synonym for 'Tax Planning' or 'Business Planning' or 'Insurance Planning'"). Professor Lynn observed, however, that in the "traditional sense [estate planning] deals with the conservation and transmission of wealth from generation to generation." *Id.* This Note does not survey estate planning in its broadest sense. Instead, it focuses on the traditional sense, as articulated by Professor Lynn. It strives, moreover, to remind the reader that, although "[e]state planning concerns death and taxes . . .[, it] is primarily about a larger subject, and that is people." JEROME A. MANNING, ESTATE PLANNING: HOW TO PRESERVE YOUR ESTATE FOR YOUR LOVED ONES xi (2d ed. 1992).

[10] Robert Bandy, *Statement of Principles of the Estate Planning Attorney in Texas*, 41 TEX. B.J. 169, 169, *reprinted in* CAMPFIELD, *supra* note 9, at 27.

[11] *See id.*

[12] *See id.* at 170. Robert Bandy stressed that mastering the requisite skills to be a proficient estate planner is serious challenge. *See id.*

> In order for an individual to hold himself out to the public as an estate planner, he must be thoroughly skilled in the law pertaining to wills, trusts, property rights and estates; he must be capable of concise and unambiguous draftsmanship; he must understand the broad trends and the applicable rules of income, estate, inheritance

B. *Examining the Estate Planning Process*

Because of its challenging nature, estate planning is often "a team effort consisting of several distinct skills" by different professionals.[13] First, as the orchestrator of the process, ultimate authority and responsibility for planning the estate falls on the attorney.[14] Therefore, the attorney creates the will, trust agreements, and other significant documents.[15] Second, the life insurance expert can provide, among other things, settlement options and provisions for annuities or other types of life income.[16] The life insurance expert can also offer the client options relating to the uses of life insurance that the attorney may not have considered.[17] Third, the accountant, familiar with the available assets and the costs of different objectives or alternatives, can offer an invaluable service by accurately assessing the client's financial background.[18] Finally, the trust officer "provides the knowledge and experience of fiduciary management and a facility with perpetual existence."[19]

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and gift taxation; he should be acquainted with the practices and customs of the professional fiduciaries in his area; he should be schooled in the law of business entities and be prepared to continue, dispose of, or dismember a business; he should be familiar with the essentials pertaining to pension and profit sharing plans and deferred compensation arrangements; he must have knowledge and experience and be familiar with the basic essentials of investments, insurance and accounting, and the sources of specialized advice in these areas; he should have a good understanding of the basic principles of business operations and financing; he should be a counselor with a good understanding of psychology; and finally, he should be willing to cooperate with other members of the estate planning team in the creation and implementation of the estate plan.

*Id.* at 169–70.

[13] *Id.* at 170.

[14] *Id.*; JEROME A. MANNING ET AL., MANNING ON ESTATE PLANNING 1-1 (5th ed. 1995) (noting that the client will call on the attorney to address problems involving, among other things, "gift, estate, generation-skipping and income taxes, all of which may have a significant impact on the family, all of which must be considered"); JOHN R. PRICE, PRICE ON CONTEMPORARY ESTATE PLANNING § 1.7.2 (1992) (asserting that in most cases the original attorney maintains overall control of the estate planning process "even though other attorneys . . . or advisors from other disciplines" participate in the process).

[15] *See* Bandy, *supra* note 10, at 170.

[16] *See id.*

[17] *See id.*

[18] *See id.*

[19] *Id.*

Throughout the entire process, the attorney enjoys the responsibility of "coordinating the work of other professionals into a unified estate plan because of [the attorney's] broad training and objective position."[20]

## III. THE TRADITIONAL APPROACH TO RESOLVING ESTATE PLANNING AND OTHER TYPES OF DISPUTES

When disputes occur in estate planning and in other areas of the law, litigation serves as the traditional approach to resolving such disputes.[21] Through litigation, like gun fighters, disputants "face off" against each other and attempt to use the judicial system to impose their views or wills on each other.

When parties resort to litigation to resolve disputes, courts typically provide fairly limited remedies, such as monetary awards and dispositions of property.[22] These court-ordered remedies generally lack creativity and flexibility; the court simply renders a decision, and the disputants comply with the order. Instead of encouraging parties to craft joint solutions to their own problems, litigation largely provides a battleground upon which parties fight against each other.

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[20] *Id.* Why does the attorney have such a responsibility? Robert Bandy asserted the following:

> The lawyer is charged with this primary responsibility for several reasons. First, the sole duty of the lawyer is to render skilled, independent and objective legal advice to his client; second, [the lawyer's] remuneration is not contingent on the sale or solicitation of new business; third, the client can communicate freely with his lawyer concerning his personal, financial and business affairs, secure in the knowledge that these communications will remain privileged and confidential and cannot be divulged during the client's life except with the client's consent; and fourth, the lawyer has the judgment and analytical training needed to formulate long-range plans not only to meet the client's present objectives but also to provide for flexibility in the estate plan in the event of changes in the law, economy, personal objectives or family situation. Moreover, the legal profession will have the sole responsibility for conducting any litigation growing out of the estate planning process, whether it involves taxation, constructi[ng] documents, or the contest of title to properties.

*Id.*

[21] *See* LOVENHEIM, *supra* note 1, at 3 (noting that "we call our lawyers to sue before we call our opponents to talk") (quoting CONNECTICUT ADR PROJECT, INC., FINAL REPORT OF THE BOARD OF DIRECTORS 1 (1998). Litigation has become a knee-jerk reaction in response to disputes. Over time, that reaction, filing a lawsuit, has become second nature and thus, almost automatic.

[22] *See* Dara Greene, Note & Comment, *Antemortem Probate: A Mediation Model*, 14 OHIO ST. J. ON DISP. RESOL. 663, 681 (1999).

Technically, although a clear "winner" and "loser" generally emerge from the courtroom, some observe that disputants who "win" in such proceedings do not express complete satisfaction with such an outcome.[23] Additionally, others assert that "[l]itigated solutions" in probate disputes "ignore the complex emotional issues that may underlie the dispute."[24]

Furthermore, litigation has high transaction costs. Commentators observe, for instance, that litigation may serve as a more costly option than mediation to resolve issues.[25] Financial costs aside, others note that litigation often involves emotional costs as well.[26] Combined, financial and emotional costs may thwart any real potential parties have for reconciling their conflicting goals or interests.

Although litigation may serve as an appropriate remedy for certain disputes, as previously acknowledged, it does not provide the solution to all, even perhaps most, disputes. Currently, although no tool solves every type of dispute, mediation may serve as a better and more powerful alternative to litigation in estate planning and in other areas of the law.[27]

## IV. MEDIATION'S ROLE WITHIN THE CONTEXT OF ESTATE PLANNING

### A. *Defining Mediation*

Mediation has been described as better than litigation.[28] It has also been described as "more accessible and understandable to the layperson, less

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[23] *See* The Mediation Information & Resource Center, *Benefits of Mediation*, *at* http://www.mediate.com/articles/benefits.cfm (last visited Apr. 12, 2001) (arguing that disputants generally express greater "satisf[action] with solutions that have been mutually agreed upon, as opposed to solutions that a . . . third party decision-maker," such as a judge, has imposed).

[24] Susan N. Gary, *Mediating Probate Disputes*, 13 PROB. & PROP. 11, 11 (July/Aug. 1999).

[25] *See id.* at 13; The Mediation & Information Resource Center, *supra* note 23, *at* http://www.mediate.com/articles/benefits.cfm (noting that mediation is usually less expensive than litigation and "other forms of fighting").

[26] *See* Gary, *supra* note 24, at 12 (maintaining that mediation presents less stress and trauma than litigation because litigation puts clients against each other and tends to increase existing tension or conflict).

[27] *See* Gary, *supra* note 4, at 397 (asserting that "[m]ediation has proven to be a workable and increasingly prevalent alternative to litigation in various types of disputes").

[28] *See* Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1588 (1995). Hensler observed that mediation falls under the umbrella term of alternative dispute resolution (ADR). When observing the historical roots of ADR, she notes that

adversarial, expensive, and time-consuming; and more likely to produce an outcome that matches the interests of the disputants."[29]

Although mediation is a well-known practice,[30] many cannot agree on a single definition that fully embodies the concept.[31] Nonetheless, some define mediation as "assisted negotiation"[32] and negotiation as "communications for agreement."[33] Based on this reasoning, mediation acts as a form of "assisted communications for agreement."[34]

Others define mediation as a "consensual process in which a neutral third party, without any power to impose a resolution, works with the disputing parties to help them reach a mutually acceptable resolution of some or all of the issues in dispute."[35]

Although different definitions exist, most modern definitions of mediations contain three common elements: 1) voluntariness,[36] 2) the

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ADR is "usually defined as the use of conciliation, *mediation*, arbitration, and other nonadjudicative or quasi-adjudicative mechanisms to resolve cases." *Id.* (emphasis added).

[29] *Id.* at 1594.

[30] *See* JACQUELINE M. NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL 54 (1992) (noting that resolving disputes through mediation is not new in the United States, and that even early immigrants mediated disputes rather than relying on American courts to resolve existing disputes); Rudolph J. Gerber, J., *Recommendation on Domestic Relations Reform*, 32 ARIZ. L. REV. 9, 14 (1990) (observing that mediation finds roots in African mores, socialist courts, and psychotherapy).

[31] *See* Donald T. Weckstein, *In Praise of Party Empowerment—And of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 508 (1997) (stating that, although most modern definitions of mediation share some common elements, they vary slightly in language and scope); Stephen R. Marsh, *Mediation: What is Mediation?*, *at* http://www.adrr.com/adr1/essayi.htm (last visited Apr. 12, 2001) ("Mediation means so many things. Often the different meanings are in harmony and improve each other . . . .").

[32] The Mediation Information & Resource Center, *What Is Mediation?*, *at* http://www.mediate.com/articles/what.cfm (last visited Apr. 12, 2001).

[33] *Id.*

[34] *Id.* (noting that "[s]o long as participants understand the nature of a contemplated mediation process and effectively consent to participate in the described process, virtually any mediation process is possible and appropriate").

[35] Stephanie A. Beauregard, *Court-Connected Juvenile Victim-Offender Mediation: An Appealing Alternative for Ohio's Juvenile Delinquents*, 13 OHIO ST. J. ON DISP. RESOL. 1005, 1011 (1998) (quoting ROBERT A. BARUCH BUSH, MEDIATION INVOLVING JUVENILES: ETHICAL DILEMMAS AND POLICY QUESTIONS 4 (1991)); *see also* Gerber, *supra* note 30, at 14 (defining mediation as "a process in which a third party, the mediator, encourages the disputants to find a mutually agreeable settlement by helping them to identify issues, reduce misunderstandings, vent emotions, clarify priorities, find points of agreement, and explore areas of compromise").

[36] *See* JASPER, *supra* note 4, at 23 (indicating, however, that mediation is voluntary and may be terminated at any time unless the court orders or a statute prescribes it).

assistance of a third party facilitator,[37] and 3) the absence of neutral, third-party power to resolve an existing dispute.[38] As evidenced from these three common elements, "the principle of self-determination" lies at the heart of mediation.[39] Under this principle, the disputants—not a third party such as an arbitrator or a judge—maintain the exclusive power to resolve their dispute.[40]

Moreover, some describe mediation as nonadversarial.[41] Though often true, this is not always the case.[42] For example, mediating disputes between

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[37] *See* Weckstein, *supra* note 31, at 508; *see also* LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 313 (2d ed. 1997); J.W. "ZIG" ZEIGLER, JR., THE MEDIATION KIT: TOOLS TO SOLVE DISPUTES 11 (1997); GOLANN, *supra* note 4, at 4; Gerber, *supra* note 30, at 14–15.

[38] *See* Weckstein, *supra* note 31, at 508; *see also* GOLANN, *supra* note 4, at 4; RISKIN & WESTBROOK, *supra* note 37, at 313; ZEIGLER, JR., *supra* note 37, at 11; Gerber, *supra* note 30, at 14–15 (citing Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 498 (Winter 1984)).

[39] Weckstein, *supra* note 31, at 508; *see also* Judge Marietta Shipley, *Family Mediation in Tennessee*, 26 U. MEM. L. REV. 1085, 1090 (1996) (arguing that mediation "emphasizes the participants' own responsibility for making decisions that affect their lives").

[40] *See* STEVEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 123 (3d ed. 1999) (maintaining that the mediator lacks the authority to impose judgment on disputants); ZEIGLER, JR., *supra* note 37, at 11 (stating that the "mediator is not empowered to render a decision but merely to guide the parties to their own voluntary settlement"); Weckstein, *supra* note 31, at 508. By contrast, in arbitration proceedings, the parties delegate the power to resolve a dispute to a third party. *See id.* Additionally, the mediation process differs from the arbitration process. Like litigation, arbitration is adjudicative in nature. *See id.* at 508–09. Arbitration involves an adversarial system that includes presenting evidence through witnesses and documents, cross-examining witnesses, and yielding to a judgment by a decision from a third party. *See id.* (citing to MARTINDALE-HUBBELL DISPUTE RESOLUTION DIRECTORY 3-3 (1996)). Alternatively, mediation aims "to facilitate communication between the parties, assist them on focusing on real issues of the dispute, and generate options for settlement." *Id.* at 509 (citing KIMBERLEE K. KOVACH, MEDIATION PRINCIPLES AND PRACTICE 17 (1994)). Furthermore, "[a] mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement." *Id.* (citing *Preface to* MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2 (1994)).

[41] *See* Weckstein, *supra* note 31, at 509 (citing FLA. STAT. ANN. § 44.1011(2) (West Supp. 1997)).

[42] *See* GOLDBERG ET AL., *supra* note 40, at 124 (asserting that the mediation strategies vary considerably and that some mediators strive to remain neutral while others consciously advocate specific outcomes and protect the interests of certain parties or nonparties) (citing William Smith, *Effectiveness of the Biased Mediation*, 1 NEG. J. 363 (1985)); ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION 3 (Diane Burch Beckham

unions and employers that involve collective bargaining agreements often introduces an adversarial element into the mediation process.[43] The same has been said about court-referred personal injury actions and divorce mediations.[44] Though collaboration serves as a primary goal of mediation, some commentators insist that the "essential nature of the process is not lost if the parties remain adversarial but agree to compromise their differences to avoid a strike or to save the expense and uncertainty of litigation."[45]

Finally, the concept of neutrality or impartiality serves as another factor commonly employed to define mediation.[46] Throughout the mediation process, the mediator strives to maintain an "equal and balanced responsibility" of assisting each party.[47] As a result, the mediator does not favor one party's interest over another or prefer a particular result in the mediation process.[48] In addition, although the mediator has an ethical obligation to reveal substantive bias on substantive issues,[49] the role of the mediator aims to ensure that disputants reach agreement in an informed and voluntary manner, "not as a result of coercion or intimidation."[50] Although some argue that mediation promotes concepts such as neutrality or impartiality, others maintain neutrality or impartiality is "neither realistic in all cases nor an essential ingredient of the [mediation] process."[51]

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ed., 1994) (stating that some mediators mediate aggressively by challenging and questioning the positions of the disputants); Weckstein, *supra* note 31, at 509.

[43] *See* Weckstein, *supra* note 31, at 509.

[44] *See id.*

[45] *Id.*

[46] ZEIGLER, JR., *supra* note 37, at 11; Weckstein, *supra* note 31, at 509. Professor Weckstein argued, however, that "[t]he more realistic ethical standards for the practice of mediation do not mandate that a mediator [act as] a neutral or impartial person but only require the mediator act impartially." *Id.* at 510 (citation omitted); The Mediation Information & Resource Center, *supra* note 32, *at* http://www.mediate.com/articles/what.cfm.

[47] *See* The Mediation Information & Resource Center, *supra* note 32, *at* http://www.mediate.com/articles/what.cfm.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Weckstein, *supra* note 31, at 510. In the article, Professor Weckstein observed that everyone has "individual predispositions, prejudices, and biases." *Id.* (citing SIMON ROBERTS, ORDER AND DISPUTE 71, 74–75, 123, 126–27, 163, 165 (1979) (observing the challenges associated with identifying and relying on a truly neutral mediator in traditional societies and noting that neutrality serves a more important role in arbitration, where disputants control the outcome of the process)). Additionally, Professor Weckstein observes that "inherent in the nature of the mediator's calling is a 'bias' in favor of settlement. In fact, many mediators push hard to achieve that end, although facilitative mediators often choose to disassociate themselves from the fairness of the settlement."

## B. *The Need for Mediation*

The common elements of mediation aside, commentators assert the need for mediation in the following manner:

> Mediation is usually a by-product of failure—the inability of disputants to work out their own differences. Each party typically comes to mediation locked into a position that the other(s) will not accept. The parties distrust each other and may be angry, frustrated, discouraged, or hurt. Their inability to reach a settlement may be due as much to the emotions of the case as to the facts. . . .[52]

As suggested above, anger, distrust, and other issues stem from adversarial systems such as litigation and arbitration. These issues create tension between disputants and prevent them from reaching agreement. Unlike litigation and arbitration, mediation provides a host of benefits (discussed below) that empower disputants to reach agreement. These benefits make clear the need for mediation.

## C. *The Benefits of Mediation*

Apart from being nonadversarial and neutral or impartial, mediation offers a number of benefits, including the following: a third party who protects the integrity of the proceedings by maintaining confidentiality;[53]

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Weckstein, *supra* note 31, at 510 (citing Tom Arnold, *Vocabulary of ADR Procedures*, Part 2, DISP. RESOL. J., Jan.–Mar. 1996, at 60, 63 n.11 (hinting that "balance" may serve as a more suitable term than "neutral")). Professor Weckstein believes that the "more realistic ethical standards for the practice of mediation do *not* mandate that a mediator be a neutral or impartial person but only require that the mediator act impartially." Weckstein, *supra* note 31, at 510 (citing MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 40) (emphasis added). Professor Weckstein notes, however, that "the accepted definitions of mediation do not preclude the mediator from offering suggestions, recommendations, opinions, information, predictions, or even advice and proposals. The key criterion is a mediator's facilitation of self-determination by the disputants." Weckstein, *supra* note 31, at 511.

[52] GOLDBERG ET AL., *supra* note 40, at 105. For a thorough discussion of the mediation process, see Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7, 8–13, 17–38 (1996).

[53] *See* Donahue & Tregub, *supra* note 5, at 650; Marsh, *supra* note 31; The Mediation Information & Resource Center, *supra* note 32, *at* http://www.mediate.com/articles/what.cfm. In his article, Gromala notes that "[m]ost jurisdictions provide broad protection to mediation proceedings including prohibiting the mediator from testifying if there is subsequent litigation. Oral and written admissions,

good faith from the participants (i.e., entering the proceedings with the intent to work towards a resolution);[54] actual presence of parties with the authority to act;[55] and an appropriate site or venue to conduct the process.[56]

### 1. *Provides a Less Formal Atmosphere than Traditional Adversarial Process and Encourages Active Communication*

Additionally, many observe that mediation is less formal and structured than traditional litigation.[57] This feature allows parties to create the approach that they will use.[58] By doing so, mediation encourages the parties to communicate actively.[59] Such open communication empowers the parties to resolve potential misunderstandings and narrow the focus on the issues in dispute.[60]

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offers, notes, etc. made during mediation cannot be used in litigation." Gromala, *supra* note 7. He also points out that "California has codified the confidential nature of mediation proceedings in CCP 1775 et. seq. and Evidence Code sections 703.5, 1152.5, 1152.6." *Id.* Finally, he notes that mediation agreements outline the bounds of confidentiality, whether mediation occurs in the planning stages or in a contested proceeding. *See id.* In her article, Greene states that mediation "prevents the embarrassing possibility of having one's 'skeletons' revealed to the general public that characterizes in-court procedures." Greene, *supra* note 22, at 680 (citations omitted). Greene further observes that because the public cannot access the record of mediation disputes, the mediation process ensures the confidentiality of secrets. *See id.* at 680 n.114. Marsh asserts that dispute resolution programs for disputants "require the parties to take all notes on provided paper and then take and destroy even the notes after each session." Marsh, *supra* note 31, *at* http://www.adrr.com/adr1/essayi.html.

[54] *See* Marsh, *supra* note 31. Scholars stress, however, that effective mediation requires the parties to "have a good faith interest in settling their dispute." JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION WITH FORMS 117 (2d ed. 1997).

[55] *See* The Mediation Information & Resource Center, *supra* note 23, *at* http://www.mediate.com/articles/benefits.cfm.

[56] *See* GRENIG, *supra* note 54. Generally, such a characterization refers to a neutral venue or site that is "conducive to the process. It must mean a place where neutrality, confidentiality and inclusiveness may be obtained. The place is sometimes as important as the persons and is a part of the process often overlooked." *Id.*

[57] *See* JASPER, *supra* note 4, at 23; Donahue & Tregub, *supra* note 5, at 650–51. Because "there are no rules of evidence, any matter that a party believes relevant, is relevant. Thus, mediation often uncovers the parties' true underlying interests and allows them to reach for an optimal solution." RISKIN & WESTBROOK, *supra* note 37, at 488. While this may be true, many disputants "wish to hide their true needs or interests for fear of being exploited or otherwise disadvantaged during or after the negotiation." *Id.*

[58] Donahue & Tregub, *supra* note 5, at 651.

[59] *Id.*

[60] *Id.*

### 2. *Provides Emotional Benefits*

The mediation process recognizes that, apart from legal issues, disputes often involve emotional issues.[61] In guardianship proceedings, for example, an elderly person "faces a potential loss of dignity, as well as the loss of legal and civil rights."[62] Although the proceeding may assist the elderly person with practical or economic concerns,[63] it may ignore emotional issues and thus leave the person angry, bitter, or confused.[64] Mediation provides the elderly person with "a voice."[65] Specifically, the process allows the elderly person to speak about his concerns and affords family members an opportunity to explain the need for the guardianship.[66]

### 3. *Resolves Disputes in Less Time than Arbitration and Litigation*

Mediation offers another benefit in that it generally resolves disputed issues in significantly less time than arbitration hearings[67] and litigation.[68] One primary reason why mediation resolves disputes faster than arbitration is that it does not concern itself with testimony from people who lack direct involvement in the dispute.[69]

Similarly, mediation usually resolves disputes in less time than litigation for a number of reasons. First, parties can schedule a mediation session in three days to three weeks rather than three months to three years for court settings.[70] Second, postponements do not create problems in mediations as they do in court proceedings.[71] Third, "[t]here is no waiting on the call of the

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[61] *See* GOLANN, *supra* note 4, at 6; Gary, *supra* note 4, at 425–26; Gary, *supra* note 24, at 12.

[62] Gary, *supra* note 4, at 426.

[63] *See id.*

[64] *See id.*; Gary, *supra* note 24, at 12.

[65] Gary, *supra* note 4, at 426; *see also* Gary, *supra* note 24, at 12.

[66] *See* Gary, *supra* note 4, at 426.

[67] Donahue & Tregub, *supra* note 5, at 651. Donahue and Tregub maintain that often disputants can resolve issues after "a day session of meetings and follow-up meetings or telephone conferences." *Id.*

[68] *See* ZEIGLER, JR., *supra* note 37, at 25.

[69] *See id.* at 13 (stating that mediation generally does not employ the use of witnesses). Commentators state that disputants can often tailor alternative dispute resolution systems such as mediation to specific problems and their needs and, thus, save time and money. *See* GRENIG, *supra* note 54, at 4.

[70] *See* ZEIGLER, JR., *supra* note 37, at 25.

[71] *See id.* (noting that going to court repeatedly "for the same case only to keep being put off" frustrates many people).

mediation docket as there is on the call of the court docket."[72] Mediation operates by appointment.[73] Finally, disputants cannot appeal settlements reached through mediation.[74] Whereas court appeals can add one to three years before resolving a dispute, once parties reach agreement under mediation, "[i]t is a 'done deal.'"[75]

### 4. *Maintains Privacy and Confidentiality and Educates Clients About Their Cases*

Whereas the results of "arbitration decisions are published and readily available to the public,"[76] unless the parties otherwise agree,[77] mediation maintains the privacy and confidentiality of the results that stem from the process.[78] The need for privacy and confidentiality arise in a variety of settings, including will contests and probate matters.[79] Moreover, beyond any

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[72] *Id.*

[73] *See id.*

[74] *See id.*

[75] *Id.*

[76] Donahue & Tregub, *supra* note 5, at 651.

[77] *See* Gary, *supra* note 4, at 425 (asserting that the scope of confidentiality and privacy "depend[s] on the wishes of the parties"). *But see id.* (noting, however, that the American Bar Association's Standards of Practice for Lawyer Mediators in Family Disputes instructs mediators to "ask the parties to sign an agreement not to disclose" information conveyed during mediation) (citing NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY & PRACTICE § 9:23, at 48 (2d ed. 1994)). Commentators assert that such agreements allow disputants "to speak more freely, air grievances more openly, and generate solutions without fear of legal consequence." Gary, *supra* note 4, at 425.

[78] *See* GRENIG, *supra* note 54, at 3 (stating that because most alternative dispute resolution proceedings commune in private, disputants can preserve the outcomes of the proceedings from the public); RISKIN & WESTBROOK, *supra* note 37, at 488 ("Mediation thrives best in an atmosphere of free and open discussion. To foster such discussion requires that information revealed during a mediation be shielded against subsequent disclosure both in and out of court."); ZEIGLER, JR., *supra* note 37, at 25 (arguing that mediation allows parties to shield the nature of their dispute from "the public openness of the courtroom"); Donahue & Tregub, *supra* note 5, at 651; Gary, *supra* note 4, at 424–25. *But see* RISKIN & WESTBROOK, *supra* note 37, at 488 (noting that "[c]ourts have a need for 'everyman's evidence'" and "[o]ther societal interests may require protection"); John R. Murphy III, Comment, *In the Wake of* Tarasoff*: Mediation and the Duty to Disclose*, 35 CATH. U. L. REV. 209, 224 (1985) (asserting that the mediator may have legitimate reasons to breach the confidentiality of the mediation proceedings).

[79] Commentators note that probate disputes often involve personal information. Gary, *supra* note 4, at 424. In a will contest, for example, a party may question a decedent's abilities or capacity. *See id.* In such a probate dispute, "the motives or actions

nondisclosure agreements signed by the disputants, the confidentiality of the mediation process "depend[s] on state law."[80]

Mediation also serves as "an effective way to educate [a] client" about the weaknesses of her case and the strengths of the other party's case.[81] In addition, it enables counsel to examine "how good a witness [the] client will be."[82] Such a preview "may prove pivotal in determining whether or not to proceed to arbitration."[83] These features further illustrate the benefits of mediation.

### 5. *Reduces Stress Levels, Preserves Longstanding Relationships, and Provides a Less Costly Option to Litigation or Arbitration*

Mediation also reduces the stress levels of disputants in at least two ways.[84] It "soothes ruffled feathers"[85] and ensures that each party has a chance to communicate.[86] Furthermore, mediation provides disputants with an opportunity to preserve longstanding relationships, whether business or personal.[87] Some assert that mediation encourages disputants to maintain "a healthy relationship," because the process forces dueling parties to work together to resolve issues.[88] By working together, the parties begin to understand each other's positions.[89]

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of other parties may be suspect." *Id.* Commentators observe that "[a]ccusations against a party for violati[ng] societally approved behavior can be damaging if publicly stated." *Id.*

[80] Gary, *supra* note 4, at 425 (citing ROGERS & MCEWEN, *supra* note 77) (stating, however, that states typically "limit the admissibility [of settlement discussions] into evidence").

[81] Donahue & Tregub, *supra* note 5, at 651–52 ("Mediation may be the first time that you are forced to assess the merits of your client's case and convey the likelihood and scope of recovery that your client can expect.").

[82] Donahue & Tregub, *supra* note 5, at 652.

[83] *Id.*

[84] *See* ZEIGLER, JR., *supra* note 37, at 26.

[85] *Id.*

[86] *See id.*

[87] *See* GOLANN, *supra* note 4, at 6 (noting that mediation preserves "continuing relationships" that involve "business contract disagreements" and "land-use disputes between neighboring property owners"); Donahue & Tregub, *supra* note 5, at 652; Gary, *supra* note 4, at 428 (arguing that mediation "can repair, maintain, or improve ongoing relationships"); Greene, *supra* note 22, at 680 (citing Stanard T. Klinefelter & Sandra P. Gohn, *Alternative Dispute Resolution: Its Value to Estate Planners*, EST. PLAN., May/June 1995, at 147, 149).

[88] Greene, *supra* note 22, at 681.

[89] *See id.*

ADR tools such as mediation also resolve issues at costs significantly lower than litigation.[90] Commentators assert, for instance, that on average mediation costs 10% less than litigation and that, aside from the costs of attorney fees, mediation does not include "court costs, filing fees, docketing fees, subpoena fees, court reporter fees, and witness charges."[91]

### 6. *Empowers Parties to Create Unique Solutions*

Mediation empowers disputants to create unique solutions to their disputes.[92] Because mediation enables disputants to construct any settlement they wish,[93] they are not limited to typical remedies such as monetary awards and legal dispositions of property.[94] Commentators observe that only "the parties' imagination and individual interests" limit the range of solutions in mediated disputes.[95]

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[90] *See id.* (citing Gerber, *supra* note 30, at 11) (asserting that California's mandatory mediation programs involving custody disputes, on average, charge one-fourth the cost of trials)). *But see* Academy of Family Mediators, *at* http://www.igc.org/afm/afmfaq.html#II9 (last visited Feb. 19, 2000) (maintaining that "[t]he cost of mediation can vary tremendously depending on where [a client] live[s], whether the mediator is in private practice or works in a court or community mediation program").

[91] ZEIGLER, JR., *supra* note 37, at 24–25.

[92] *See id.* at 26 (noting that whereas judges and lawyers engage in the legal process by using rules of procedure and evidence, mediation encourages parties to participate personally in resolving disputes); GRENIG, *supra* note 54, at 4; Greene, *supra* note 22, at 681 (citing Gary, *supra* note 4, at 398) (stating that mediation enables parties to create a solution that satisfies the interests of both parties).

[93] Donahue & Tregub, *supra* note 5, at 652; Greene, *supra* note 22, at 681 The Mediation & Information Resource Center, *supra* note 23, *at* http://www.mediate.com/articles/benefits.cfm. In her article, Greene observes, for example, that dividing "property can involve different methods of evaluation, including sentimental attachment . . . ." Greene, *supra* note 22, at 681. In the article by Donahue and Tregub, the authors note that, in broker-firm disputes, mediation has enabled brokerage firms to devise some of the following creative solutions: "retracting statements, reinstating an employee, providing a letter of reference or providing contacts for future business endeavors." Donahue & Tregub, *supra* note 5, at 652.

[94] *See* Greene, *supra* note 22, at 681; Andrew K. Niebler, Note, *Getting the Most Out of Mediation: Toward a Theory of Optimal Compensation for Mediators*, 4 HARV. NEGOT. L. REV. 167, 167 (1999) (observing that because parties determine the solutions to their disputes, the solutions "can be non-monetary and tailored directly to the parties' situations").

[95] Niebler, *supra* note 94, at 167.

### 7. *Process May Teach Parties How to Communicate With Each Other More Effectively*

The process may also teach disputants how to communicate more effectively with each other. As previously noted, mediation does not generally allow the mediator to choose sides[96] or decide a disputed issue.[97] Instead, the process generally allows disputants to make these decisions.[98] Additionally, the process recognizes that, to reach an optimal settlement, disputants must resolve the issues between themselves. Mediation merely provides parties with the means to resolve the issues.

As a result, each party has an incentive to ensure that the other party understands its ideas and concerns. Because the mediation process encourages both parties to create a mutually beneficial settlement, parties have a vested interest in listening and clearly communicating to each other. Instead of jockeying for positions, parties learn to hear and take time to understand each other's ideas and concerns. Accordingly, they better communicate with each other.

### 8. *Offers High Compliance Rates and Settlements That Endure*

Finally, commentators assert that parties who resolve their own agreement through mediation tend to exhibit higher follow-through and compliance rates than those who use a third party decision-maker, such as a judge, to resolve a dispute.[99] Mediated settlements also tend to endure.[100]

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[96] *See* The Mediation & Information Resource Center, *supra* note 32, *at* http://www.mediate.com/articles/what.cfm.

[97] *See* Weckstein, *supra* note 31, at 508.

[98] *See id.*

[99] *See* The Mediation Information & Resource Center, *supra* note 23, at http://www.mediate.com/articles/benefits.cfm.

[100] *See id.* (observing that "if a later dispute results, the parties are more likely to utilize a cooperative forum of problem-solving," such a mediation, "to resolve their differences than to pursue an adversarial approach").

## *D.* Analyzing the Mediation Process

Although the structure of the mediation process varies considerably,[101] some commentators have developed a four-stage mediation process.[102] These stages include 1) creating a forum or bargaining framework, 2) sharing and gathering information, 3) problem solving, and 4) decision making. Before mediating a dispute, parties select a mediator.[103]

During the first stage—creating a forum or bargaining framework—the mediator describes "the nature of the process" to the disputants.[104] Moreover, the mediator lays out the ground rules[105] and strives, among other things, to connect with the parties and gain their trust as a neutral third party.[106] Disputants meet with the mediator to discuss the issues involved in the dispute.[107] By design, the mediator gives each party a chance to express its opinion.[108] The mediator explains the mediation process (described further below) to each respective party and answers any existing questions.[109]

During the second stage—sharing and gathering information—the mediator typically meets with each disputant individually.[110] Such a meeting allows each party to express its position clearly and candidly.[111] During individual sessions, to identify commonalties, "the mediator presents and discusses each party's concerns with the other party."[112]

To help parties identify common issues or problems, after meeting with each party individually, the mediator may arrange a joint session with all the

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[101] *See* GARY GOODPASTER, A GUIDE TO NEGOTIATION AND MEDIATION 207 n.3 (1997) (noting that "some commentators describe a three-stage process, e.g., setting the stage, problem solving, and achieving a workable agreement" while others "describe more stages, as many as seven, e.g., introduction, problem-determination, summarizing, issue identification, alternatives generation, alternative selection, and closure").

[102] *See id.* at 207.

[103] *See* JASPER, *supra* note 4, at 24–25.

[104] GOODPASTER, *supra* note 101, at 207.

[105] "The mediator makes clear to the parties that he has a neutral role and he will not act as an advocate for any party." GOODPASTER, *supra* note 101, at 209. He observes, among other things, that "[h]e has a role of ensuring that the parties deal with each other civilly and fairly." *Id.* Moreover, he stresses that, if necessary, "[h]e will enforce certain rules of decorum, but [notes that] he is not a decision maker who will impose a particular settlement on them." *Id.*

[106] GOODPASTER, *supra* note 101, at 207–08.

[107] *See* JASPER, *supra* note 4, at 24–25.

[108] *See id.*

[109] *See id.*

[110] *See id.* at 25; GOODPASTER, *supra* note 101, at 209.

[111] *See* JASPER, *supra* note 4, at 25.

[112] *Id.*; GOODPASTER, *supra* note 101, at 209.

parties involved.[113] This approach comprises the third stage of the mediation process—problem solving.[114] During this stage, the mediator continues to conduct individual and joint meetings until disputants reach a settlement, although sometimes they cannot do so.[115]

During the decision making stage—the final stage of the process—the mediator helps parties to "select mutually agreeable or, at least, acceptable solutions to [identified] problems."[116] After identifying potential solutions, parties evaluate and select options that may form the basis of an agreement.[117] If parties reach a settlement, then the mediator helps them to formalize their written arrangement.[118] As long as the mediator and the disputants properly execute the agreement, it "bind[s] . . . all parties and [therefore] may be used in litigation should one of the parties breach . . . [its] terms."[119]

### E. *Evaluating the Use of Mediation in Other Areas of the Law*

Mediation has been employed as a successful alternative to traditional adjudication in divorce and elder law.[120] As with estate planning disputes, emotional conflicts between family members play a role in divorce[121] and elder law.[122] Apart from emotional costs[123] in divorce law cases, other

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[113] *See* JASPER, *supra* note 4, at 25; GOODPASTER, *supra* note 101, at 211.

[114] *See* GOODPASTER, *supra* note 101, at 211.

[115] *See* JASPER, *supra* note 4, at 25.

[116] GOODPASTER, *supra* note 101, at 212.

[117] *See id.*

[118] *See* JASPER, *supra* note 4, at 25.

[119] *Id.*

[120] *See* Greene, *supra* note 22, at 681 (citing Gerber, *supra* note 30, at 11). "Divorce law" or "family law" refers to disputes that involve "divorce, child custody, property settlement, and post-divorce modification of decree." Gary, *supra* note 4, at 401. "Elder law" refers to "practitioners whose focus is on a population group, persons 65 years of age and older." Clifton B. Kruse, Jr., *The Elderly Law Attorney: Working with Grief*, 3 ELDER L.J. 99, 99–100 (1995). Moreover, the term refers to "the myriad of legal problems individuals within that group face, including health care, Medicare and Medicaid planning, elder abuse, and problems involving dementia and capacity." *Id.*

[121] The term "family law" encompasses disputes that concern the following: divorce, child custody, property settlement, and post-divorce modification of decree. *See* Gary, *supra* note 4, at 401.

[122] *See* Greene, *supra* note 22, at 681 (citing Gerber, *supra* note 30, at 14–15).

[123] *See* Gerber, *supra* note 30, at 11 (maintaining that, unlike mediation, "[t]he adversarial process impedes . . . [the] possibility" of maintaining an ongoing relationship

problems stem from the adjudication process: financial costs, harm to children, wasted energy and expectations, and loss of confidence in the legal system.[124]

### 1. *Divorce Disputes*

Resolving family disputes through mediation has become a well-known practice.[125] Some commentators assert that, in divorce disputes, certain indicators signal the appropriateness of mediation, including "the likelihood of a future relationship, an emotional dimension to the dispute, and the need for options and solutions tailored to the circumstances of the parties."[126]

Accordingly, in divorce disputes, the practice of mediation has increased, because, whereas "traditional adversarial litigation worsens rather than resolves modern marital disputes,"[127] mediation attempts to ensure that spouses establish a strong relationship.[128] The tension created by being forced against each other does not foster the spirit of cooperation required for divorcing couples to resolve conflicts surrounding issues such as child support and custody.[129]

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and that "[u]ninhibited warfare inflames the passions of litigants and often undermines the cooperation and communication needed for post-divorce parenting").

[124] *See id.* First, Gerber notes that "domestic cases occupy a great deal of scarce judicial time and money. Moreover, they consume a substantial part of wealth available to the parties, often reducing the parties' standard of living after divorce." *Id.* Second, Gerber points out that the adjudicative process "is ill-suited to the interests of children in custody matters," noting that the "litigation process is likely to create adjustment problems for the children." *Id.* at 12. Third, Gerber states the following: "Divorce litigation is still heavily dominated by the matrimonial 'bomber,' a term coined to describe the overzealous advocate typified by Arnie Becker on 'L.A. Law.'" *Id.* at 13. In addition, he notes that "[t]he matrimonial bomber charges high fees, is in business to accommodate hate, is ruthless, eggs on individuals and turns potentially solvable situations into nightmares." *Id.* Finally, Gerber observes that "the public's perception of the role of courts and lawyers in family disputes is often negative." *Id.*

[125] *See* Gary, *supra* note 4, at 401 (citing JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 1-7 (1984)).

[126] *Id.* After a divorce, for example, disputants often need to maintain a relationship. *See id.* "If the [disputants] have children they will certainly need to have a future relationship, but [if they do not], a future relationship may be desirable." *Id.*

[127] Gerber, *supra* note 30, at 14.

[128] *See* Greene, *supra* note 22, at 681–82 (citing Gerber, *supra* note 30, at 11) (noting that California's mandatory mediation program for custody disputes costs on average one-fourth the cost of trials).

[129] *See id.* at 681 (citing Gerber, *supra* note 30, at 15).

Mediation has helped to resolve divorce disputes because, it encourages parties to resolve their own disputes.[130] Additionally, it allows the couples "to address emotional issues; to understand, or at least listen to, each other's concerns; to build a means for resolving future disputes; and to reach an agreement that meets their unique needs."[131] Studies indicate that disputants who mediate divorce settlements tend to express more satisfaction with the process and results than parties who litigate or negotiate such disputes.[132]

Despite the undeniable force of these studies, researchers concede that the effective use of mediation in family disputes has its limits.[133] Specifically, many observe that the use of mediation is inappropriate in cases that involve violence or abuse.[134] Although commentators have expressed the

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[130] *See* Gary, *supra* note 4, at 402–03.

[131] *Id.*

[132] *See id.* at 403 (citing GWYNN DAVIS & MARIAN ROBERTS, ACCESS TO AGREEMENT: A CONSUMER STUDY OF MEDIATION IN FAMILY DISPUTES (1988); ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION 183–93 (1994); Stephen J. Bahr, *Mediation Is the Answer: Why Couples Are So Positive About This Route to Divorce*, FAM. ADVOC., Spring 1981, at 32, 35 ; Robert E. Emery & Joanne A. Jackson, *The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes*, MEDIATION Q., Summer 1989, at 3, 17; Joan B. Kelly, *Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes*, MEDIATION Q., Summer 1989, at 71, 87; Joan B. Kelly & Mary A. Duryee, *Women's and Men's Views of Mediation in Voluntary and Mandatory Settings*, 30 FAM. & CONCILIATION CTS. REV. 34 (1992)); *see also* Gerber, *supra* note 30, at 15 (noting that the Denver Custody Mediation Project study revealed that the overwhelming majority—92%—of all successful mediation clients were pleased with the process; that they would employ the process again or recommend it to another person; that their "greatest satisfaction" stemmed from their final agreements; and that of those who settled during the process, three-quarters of them were satisfied with their final agreements) (citations omitted). *But see* Jessica Pearson, *The Equity of Mediated Divorce Agreements*, 9 MEDIATION Q. 179, 192–93 (1991) (concluding "that mediation is no worse than adversarial and independent decision making in generating agreements that are perceived to be equitable and fair").

[133] *See* Gary, *supra* note 4, at 403.

[134] *See id.* (citing JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 185 (1984); Allan Edward Barsky, *Issues in the Termination of Mediation Due to Abuse*, 13 MEDIATION Q. 19, 33–34 (1995); Anthony F. Cottone, *Questions and Answers About Divorce Mediation*, R.I. B.J. June 1995, at 9)). "Extreme anger connected with the divorce may make it impossible for the parties to mediate." *Id.* The biggest challenge, however, for mediating divorce disputes "occurs when an imbalance of power exists between the parties." *Id.* Professor Gary argues that if one party has exercised control "over the other [party] during the relationship, that control will likely continue to occur in mediation." *Id.* at 404–05 (citations omitted). Unfortunately, studies indicate that the power imbalance issue disproportionately impacts women. *See id.* at 403 (citing Michael Benjamin & Howard

above concerns about the mediation process,[135] empirical evidence has demonstrated that parties have expressed considerable satisfaction with mediating divorce and child custody disputes.[136]

### 2. *Elder Law Disputes*

Similarly, "[e]lder law has benefited from mediation techniques because work with elderly clients often involves difficult decisions and tremendous amounts of grief."[137] For example, although most health care organizations have not officially embraced mediation as their preferred dispute resolution process,[138] disputes involving healthcare decisions have adapted well to the model.[139] In hospitals and long-term care facilities, for instance, disputes can result from health treatment and care decisions.[140] Specifically, disputes can range from innocuous issues, such as disagreement over roommate assignments, to serious issues, such as removal of life support.[141] These disputes may involve multiple parties, including patients, family members, physicians, and health care staff members.[142] Moreover, factors such as limited patient capacity and family disputes over the appropriate care for an elderly relative may further complicate these disputes.[143]

### 3. *National Association of Securities Dealers Regulation ("NASDR")*

As with divorce law and elder law, the securities industry has benefited from the use of mediation. Commentators note that mediating securities

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H. Irving, *Toward a Feminist-Informed Model of Therapeutic Family Mediation*, 10 MEDIATION Q. 129, 130 (1992); Penelope E. Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177, 204 (1994)). Accordingly, feminists have criticized mediation for this express reason. *See id.*

135 *See* Gary, *supra* note 4, at 405.

136 *See id.* at 405–06. Although satisfaction rates for mediation are high, studies indicate, however, that women enjoy "a somewhat higher satisfaction rate than men." *Id.* at 406. Nonetheless, "both women and men who mediated family law disputes reported greater satisfaction with the results than women and men who had litigated their disputes." *Id.*

137 *See* Greene, *supra* note 22, at 682 (citing Kruse, Jr., *supra* note 120, at 100–101).

138 *See* Gary, *supra* note 4, at 406.

139 *See* Greene, *supra* note 22, at 682.

140 *See* Gary, *supra* note 4, at 407.

141 *See id.*

142 *See id.*

143 *See id.*

industry disputes has been cost-effective and that they expect the use of mediation in this field to increase.[144] Accordingly, commentators observe that the industry has turned to mediation, in part, to address escalating "fees, costs and time associated with arbitrating securities industry cases. . . ."[145] Commentators state that the mediation process can significantly curtail these costs.[146] A recent study conducted by NASD Regulation, Inc. confirms the efficacy of mediation and its increased presence in the securities industry.[147]

### F. *The Need for Mediation in Estate Planning Issues*

Commentators stress that disputants should seek the benefits of mediation "[w]henever a potential conflict of interest [in an estate planning issue] requires separate counsel or a 'consent to joint representation.'"[148] They advise mediation, especially in settling issues involving large estates, even if a conflict of interest is not obvious.[149] Mediation, commentators opine, may reveal a hidden conflict or uncover information that will thwart the growth of a conflict.[150]

Likewise, commentators note that mediation has been effective in resolving estate planning issues during probate and trust administration.[151] In such cases, "[r]elations between executors or trustees and beneficiaries can . . . sour because of different priorities."[152] These differences are often

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[144] *See* Donahue & Tregub, *supra* note 5, at 648 n.2 (observing that "[i]n the first seventeen months of its mediation program . . . the National Association of Securities Dealers Regulation . . . had 83% of the cases submitted to mediation settle").

[145] *Id.* Why? Arbitration is increasingly becoming more litigious and thus more costly and time consuming. *Id.*

[146] *Id.*

[147] *See* Press Release, NASD, NASD Regulation Marks First-Year Anniversary of Mediation in the Securities Industry (Aug. 7, 1996), *reprinted in* Donahue & Tregub, *supra* note 5 app. "A," at 667 (revealing the following: 1) "[m]ore than 85 percent of the claims submitted to mediation settled," 2) the volume of "cases entering mediation as an alternative to arbitration in the last six months is triple the number for the first six months of operations," 3) "[o]n average, cases are concluding within two months of the parties' agreement to mediate," 4) although mediations currently accounts for a relatively small number of "the over 6,000 cases per year resolved through arbitration," nonetheless the "figures point to a growing trend toward the use of mediation to resolve securities disputes").

[148] Gromala, *supra* note 7.

[149] *See id.*

[150] *See id.*

[151] *See id.*

[152] *Id.*

based on "perception rather than substance."[153] Mediation can help disputants resolve ambiguous issues and help them create a plan that addresses all parties' interests.[154]

Commentators warn that courts do not have the responsibility of creating "reasonable solutions" to estate planning issues such as heirship contests or disputes that involve administrating wills and trusts.[155] They observe, however, that "[j]udges listen to scripted testimony and make decisions. The results may be cumbersome, with little relief to any party. If the goal is a solution rather than a finding of fault, mediation is the means to achieve the goal."[156]

## G. *The Benefits of Mediating Estate Planning Issues*

As previously noted, although the practice of mediating estate planning issues before actual disputes arise is relatively new,[157] its benefits (described above) suggest that it can serve as an invaluable tool in this area of the law. Apart from the above enumerated benefits, there are additional reasons why parties should consider using mediation to resolve estate planning issues. First, mediation acknowledges the attorney's "lead role" in estate planning matters,[158] and, thus, a mediator "will not question the advice . . . an attorney [gives to clients]."[159] Mediation seeks, after all, to assist the attorney in fulfilling his responsibility to craft a plan that accomplishes "the testamentary desires of the attorneys' clients."[160]

Second, mediation may help disputants "face and resolve important subjective issues that otherwise would fester because they were not disclosed to, and thus not addressed by, the attorneys."[161] By doing so, mediation assists the attorneys with "collecting all segments of the family puzzle."[162]

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153 *Id.*

154 *See id.*

155 *Id.*

156 *See id.*

157 *Id.*

158 *Id.*

159 *Id.* By conferring individually and jointly with disputants on a confidential basis, a mediator disclosures to others only information that each party authorizes the mediator to disclose. See *id.* Accordingly, commentators contend that "[t]he mediation process can provide attorneys, accountants and financial advisors with valuable information about the clients' subjective interests and needs that should be addressed in the estate plan." *Id.*

160 *Id.*

161 *Id.*

162 *Id.*

Third, to be effective, the mediation process does not require the mediator to possess expertise in estate planning.[163] It requires the mediator, however, to know "its basic principles and terminology."[164] In short, "[e]xpertise in the mediation process and the unique ability to talk with each person, in confidence, makes the mediator a valuable member of the estate planning team."[165]

Fourth, early mediation can reduce the potential for litigation that often accompanies estate planning issues.[166] The following example illustrates this point:

> The emotional issues present in a family owned or closely held business create the climate for litigation after death of the entrepreneur or partner. These issues are often ignored or minimized by the spouses and partners during estate planning. Clients with such illiquid assets need assistance from mediation during estate planning, and certainty after the death of the testator . . . if the problems were not addressed during the planning phase.[167]

Fifth, mediation can help disputants and their respective advisors unlock "hidden issues."[168] Commentators observe that often family members such as spouses and siblings have difficulty explaining the needs and interests of others, and that the "nature of family relations" may promote "hidden agendas and suppressed emotions."[169] Misconceptions and inadequate

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[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.* Gromala observes that such "hidden issues" include conflicts of interests. *See id.* He states that such conflicts "are seldom disclosed in the presence of . . . another [party]" and that the likelihood of conflicting interests "is present in many estate plans." *Id.* He notes that "prior to the era of specialization and stringent conflict rules," attorneys performed the bulk of estate planning for clients and families they knew. *Id.* Accordingly, "[l]ike the 'family doctor,' the attorney [knew about] the family's trials, tribulations, successes and failures. In that climate, it was common for attorneys to counsel spouses without discussing the possibility of a conflict of interest." *Id.* Gromala writes that "[t]oday, [however,] many families have children who are the issue of more than one marriage or relationship and this creates the potential for conflicts of interests." *Id.*

[169] *Id.* Gromala illustrates this concept with the following example:

> One such hidden issue involved a family business run by the father with considerable help from his youngest son, Bob. The father wanted to recognize Bob's contribution by giving the enterprise to him. Bob hated the business, wanted no part of it, but never told his father [this fact] because of the great sentimental value his

communication may encourage family members to antagonize each other.[170] If not addressed, these issues can create serious problems.[171] Mediation operates as a remedy to these potential problems by facilitating the estate planning process.[172] It achieves this by "eliminat[ing] the need for foot dragging by a family member who cannot live with a proposal but does not want to be seen as an obstructionist."[173]

Sixth, mediation may help spouses to discuss sensitive areas and avoid future conflict.[174] It may uncover a latent conflict or bring out information that will prevent a conflict from developing.[175] Finally, it may help planners identify underlying emotional issues so that they can better address the family's spectrum of concerns.[176]

### H. *Potential Problems or Costs Associated with Mediating Estate Planning Issues*

Like any tool, mediation is not immune to potential shortcomings. Accordingly, commentators assert that it does not serve as an effective remedy for all disputes.[177] In short, they highlight at least five potential problems. These concern 1) imbalances of power, 2) grief, 3) long-term disputes, 4) the need for precedent, and 5) disagreement about the utility of mediation.[178]

Some observe that imbalances of power[179] and grief[180] can adversely affect the process.[181] In divorce proceedings that involve mediation, for

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> father attached to [the business]. The business was taking too much of Bob's time, to the detriment his own business and his relations with his wife and children. The father was continuing the business because he believed Bob loved it and would want to inherit it. He had absolutely no emotional ties to the business. Once the father and son could discuss the issue [with the help of a mediator] the solution was self-evident.
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> *Id.*

170 *See id.*

171 *See id.* (observing that, if not addressed, "hidden issues can become buried mines waiting to explode").

172 *See id.*

173 *Id.*

174 *See id.*

175 *See id.*

176 *See id.*

177 *See* GOODPASTER, *supra* note 101, at 219.

178 These issues are not necessarily limited to estate planning matters. The core concept behind each issue may surface in other disciplines that employ mediation.

179 *See* GOODPASTER, *supra* note 101, at 219–20; GRENIG, *supra* note 54, at 5 (stating that when power imbalances exist, the dominant party may gain an advantage by

example, imbalances of power are common.[182] Therefore, in these types of proceedings, the mediator has the well-known task of "leveling the playing field."[183]

Specifically, scholars argue that .in cases where one party has significantly less bargaining power than the other, a neutral mediator will simply facilitate the desires of the party with more bargaining power.[184] Conversely, if the mediator attempts to balance the bargaining power between the parties by intervening, another risk emerges: disputants may perceive the mediator as "taking sides."[185] If disputants react in this manner, then the mediator may lose essential ingredients to the process: neutrality and impartiality.[186]

Likewise, in estate planning matters such as postmortem probate, overwhelming grief usually adversely affects the mediation process.[187] Scholars assert that a number of factors complicate the grief process, thus making it a slow process.[188] These factors include denial, anger, and eventual acceptance of the loss.[189] In light of these factors, scholars assert that forcing grieving disputants to mediate too soon is futile.[190] Scholars maintain that, prior to accepting a loss in the grieving process, such disputants may lack the

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"marshaling its greater resources and wearing the opposing party out through drawn out judicial proceedings"); Greene, *supra* note 22, at 682 (citing Gary, *supra* note 4, at 432).

[180] *See* Greene, *supra* note 22, at 682 (citing Gary, *supra* note 4, at 432).

[181] *See id.*

[182] *See id.*

[183] *Id.* (quoting FOLBERG & TAYLOR, *supra* note 134, at 184–85). Folberg and Taylor observe that imbalances of power and destructive emotions often plague divorce proceedings where one spouse has been physically and mentally abused by the other spouse. The authors note that simple fear of being in the same room with the former spouse can result in ineffective mediation. *See* FOLBERG & TAYLOR, *supra* note 134, at 185.

[184] *See* GOODPASTER, *supra* note 101, at 219.

[185] *Id.* at 219–20.

[186] *See id.* at 220.

[187] *See* JOHN H. WILKINSON ET AL., DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK § 7.9C, at 125 (1999) (maintaining that imbalances of power compromise the effectiveness of the mediation process); Dominic J. Campisi, *Using ADR in Property and Probate Disputes*, PROB. & PROP., May-June 1995, at 48, 50; Greene, *supra* note 22, at 682 (citing Gary, *supra* note 4, at 432).

[188] *See* Campisi, *supra* note 187, at 52.

[189] *See id.*

[190] *See id.*

psychological state to address financial or other issues during the mediation process.[191]

Moreover, three additional problems may arise with mediating estate planning issues. First, when the dispute underlying a probate issue involves a family feud that has existed for many years, mediation becomes less effective.[192] In other words, the more parties "entrench[] [themselves] in their positions, the less likely it will be that mediation will be successful."[193] Second, although creating precedent may not generally concern estate planning matters such as probate,[194] in a particular case parties may desire a court-ordered verdict to establish legal precedent.[195]

Finally, clients may disagree about the utility of mediating estate planning issues before a dispute arises and, therefore, may fail to realize the value of mediating such issues. For example, while one party may encourage the use of mediation to resolve a particular estate planning issue, another party may believe that litigation or arbitration serves as the best answer to remedy the dispute.[196] Even if disputants agree to use a mediator to resolve an estate planning issue, they may be unable to select a mediator that meets their approval or agree on how to select a mediator.[197]

### I. *Other Potential Challenges Associated with Mediating Estate Planning Issues*

At least two other issues, although not specifically recognized in estate planning literature, may also discourage mediating estate planning issues.

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[191] *See id.*

[192] *See* NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE § 3.4 (1989) (observing that if disputants "have a long history of mutual antagonism," settlement through mediation appears less likely to occur) (citing Kressel & Pruitt, *Themes in the Mediation of Social Conflict*, 41 J. SOC. ISSUES. 179, 185–186 (1985); C. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 4-12 (1986)); Gary, *supra* note 4, at 433.

[193] Gary, *supra* note 4, at 433.

[194] *See id.* (citing Owen M. Fiss, Against Settlement, 93 YALE L.J. 1070 (1984)).

[195] *See id.*

[196] *See* LOVENHEIM, *supra* note 1, at 28 (asserting that "about 30 percent of cases referred to mediation never reach a hearing because one party declines to participate" and that a person "may genuinely prefer litigation because he thinks he has a good chance to win in court; or he may not perceive enough of an advantage in mediation to consider trying it").

[197] These parties may be even unwilling to select a mediator at random.

These issues involve the fear of being judged and the proactive nature of mediation.[198]

### 1. *The Fear of Being Judged May Affect Parties' Attitudes About Mediation*

Disputants may be too embarrassed to reveal highly confidential information and their perceived weaknesses to an outside party such as a mediator. Although the mediator strives to remain neutral[199] and maintain privacy and confidentiality,[200] nevertheless disputants may feel that the mediator or the other party may secretly "judge" them or their behavior when disclosing information. Granted, the disputants reveal much of the same information to their respective attorneys. However, probably in many cases, contact with the attorney occurs relatively infrequently and sporadically; in many cases, the attorney identifies the client's estate planning goals, devises a strategy, and presents it to the client at a specified date. Accordingly, disputants may not experience prolonged anxiety about being judged.

Similarly, contact may occur less with others figures involved in the estate planning process (e.g., the accountant, the life insurance agent, and the trust officer) than with the attorney. In fact, disputants may rarely, if ever, see or physically come in contact with these individuals. That being the case, these figures may remain largely invisible to the disputants. As a result, disputants may experience less anxiety about disclosing information to these individuals.

Unlike intermittent contact with the attorney and other members of the estate planning team, mediating estate planning issues may last for an indefinite period of time. The length of the process may vary considerably and may stretch for long periods of time in many cases. Therefore, disputants who never overcome their differences and thus fail to reach an agreement may experience more anxiety about being judged in the mediation setting.[201]

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[198] These issues are not necessarily limited to estate planning matters. The core concept behind each issue may surface in other disciplines that employ mediation.

[199] *See* ZEIGLER, JR., *supra* note 37, at 11; Weckstein, *supra* note 31, at 509; The Mediation & Information Resource Center, *supra* note 32, *at* http://www.mediate.com/articles/what.cfm

[200] ZEIGLER, JR., *supra* note 37, at 25; RISKIN, *supra* note 37, at 488; Gary, *supra* note 4, at 424–25; Donahue & Tregub, *supra* note 5, at 651.

[201] This result is not necessarily true. By working with the disputants over a prolonged period of time, the mediator can establish the position of neutrality and thus eliminate this concern. Also, because clients have the power to resolve their disputes, in theory the mediation process can be short.

### 2. *The Proactive Nature of Mediation May Present a Problem*

Mediating estate planning issues before actual disputes arise requires a proactive approach to problem solving. Being proactive in estate planning issues that involve wills and trusts, for example, may present a serious challenge for two reasons. First, it may remind the testator of the inevitable: death.[202] Second, being proactive reminds the testator of possible disharmony that may result among beneficiaries if she opens up her will to a mediation proceeding. When faced with these two issues, even the most thoughtful testator may resist mediation. Instead, she may find comfort with maintaining the status quo: allowing the will or trust proceeding to unfold "naturally" after she dies.

## J. *Solutions to Problems Associated with Mediating Estate Planning Issues*

Imbalances of power, grief, long-term disputes, the need for precedent, disagreement about the utility of mediation, the fear of being judged, and the proactive nature of mediation present potential problems for the mediation process. However, as explained below, these problems are not indomitable.

### 1. *Imbalances of Power and Grief*

With respect to imbalances of power and grief, scholars observe that a well-trained mediator can take affirmative steps to avoid these pitfalls.[203] As previously noted, an experienced mediator knows that imbalances of power undermine the mediation process, because they present the danger that a neutral mediator will facilitate the desires of the party with dominant bargaining power.[204] Additionally, imbalances of power do not allow both parties to participate fully in the mediation process and thus create solutions that reflect each party's needs and interests.[205]

Scholars stress that "[t]he appropriateness of mediation . . . depend[s] on whether all parties to the dispute can participate adequately."[206] In many cases, this issue may not present a problem. In cases involving the

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[202] Although death serves as an inevitable part of life, common experience teaches that people often have difficulty addressing issues that raise this issue. For example, even though death naturally follows birth, some—perhaps many—refuse to make funeral arrangements for themselves or their loved ones.

[203] Greene, *supra* note 22, at 682.

[204] GOODPASTER, *supra* note 101, at 219.

[205] *See* Gary, *supra* note 4, at 432–33.

[206] *Id.* at 432.

inheritance rights of minors, where a child cannot adequately participate in the mediation process, a court can appoint a guardian to protect the interests of minors who lack legal capacity to participate.[207] Likewise, in other cases, an attorney or another advocate can represent a child's interests during the mediation process.[208] However, in cases involving adults with limited capacity who cannot participate effectively, even with assistance from another party, mediation may not be the answer.[209] Given the extreme nature of these cases, however, they probably account for a small percentage of estate planning disputes. In sum, as long as both parties can participate fully in the process, mediation will serve as an appropriate medium.

Furthermore, as noted earlier, "[g]rief and the ways in which parties deal with their grief will also affect the parties' abilities to mediate."[210] A well-trained mediator, however, can avoid the adverse effects of grief.[211] By understanding the grieving process and its effects on parties, the mediator knows that delaying mediation until parties have finished grieving will increase the likelihood of successful mediation.[212] Consequently, as long as the mediation process accounts for the grieving process, grief will not present an insuperable problem.

### 2. *Long-Term Disputes and the Need for Precedent*

As previously noted, when an underlying dispute in a probate issue involves a long-term family feud, mediation becomes less effective.[213] An experienced and objective mediator, however, can perhaps identify such disputes and bring them to the attention of the disputants. By doing so, the mediator forces the disputants to acknowledge underlying issues that hinder real progress and deal squarely with the issues at hand. While all parties may not be able to overcome these issues, the mediation process will increase the likelihood of parties reaching agreement.

Long-term disputes aside, the need for precedent may also present a problem for mediating estate planning issues before disputes arise. Scholars observe that, in some areas of the law, the outcomes of certain cases affect other cases.[214] Accordingly, disputants in another case can use a decision

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[207] *Id.* at 433.

[208] *Id.*

[209] *Id.*

[210] *Id.* at 432.

[211] *See* Greene, *supra* note 22, at 682.

[212] Gary, *supra* note 4, at 432.

[213] *Id.* at 433.

[214] Gary, *supra* note 4, at 433.

rendered in a prior case.[215] Although in some instances establishing precedent through court verdicts may be desirable, scholars assert that creating precedent generally does not present a concern in estate planning matters, such as probate.[216] Therefore, research indicates that, in the vast majority of cases, creating precedent will not serve as an issue when parties elect to mediate estate planning issues before actual disputes surface.[217]

### 3. *Disagreement About the Utility of Mediating Disputes, the Fear of Being Judged, and the Proactive Nature of Mediation*

Finally, as indicated above, disagreement about the utility of mediation, the fear of being judged, and the proactive nature of mediation also present problems in the mediation process. However, as with other issues, these issues do not present a permanent bar to successful mediation.

#### a. *The Utility of Mediating Issues*

Because mediation operates as a neutral or impartial[218] and voluntary process,[219] for the process to work, both parties must agree to mediate the estate planning issue. If one party refuses to mediate the issue, then mediating the issue may not be possible.[220] Although the latter may be true, based on the merits of the mediation process, the other party or an independent third party may convince the opposing party to mediate the issue.

As previously noted, mediation protects the privacy and confidentiality of the proceedings,[221] provides a less formal atmosphere than litigation,[222] and encourages parties to actively communicate.[223] Additionally, it resolves disputes in less time than litigation[224] and arbitration,[225] educates disputants

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215 *Id.*

216 *Id.*

217 *See id.*

218 Weckstein, *supra* note 31, at 509.

219 JASPER, *supra* note 4, at 23.

220 LOVENHEIM, *supra* note 1, at 28 (stating that if one party refuses to mediate, then "there is little [a person] can do about it" and that "if [the] circumstances . . . change[] so that mediation [later] looks more attractive," then the person can advocate mediation again to the opposing party).

221 DONAHUE & TREGUB, *supra* note 5, at 651.

222 *Id.* at 650; JASPER, *supra* note 4, at 23.

223 DONAHUE & TREGUB, *supra* note 5, at 651.

224 ZEIGLER, *supra* note 37, at 25.

225 DONAHUE & TREGUB, *supra* note 5, at 651.

about their cases,[226] and preserves longstanding relationships.[227] These account for just a handful of benefits that mediation offers.

Accordingly, by highlighting the undeniable benefits of mediation and acknowledging its potential costs (described earlier), one party or an independent third party can persuade the other party to mediate the issue. The benefits that mediation offer may simply outweigh any concern the opposing party might have.

b. *The Fear of Being Judged*

As previously observed, disputants may be too embarrassed to reveal confidential information and perceived weaknesses to a third party, such as a mediator. Even though the mediator strives to remain neutral or impartial[228] and maintain privacy and confidentiality,[229] for whatever reasons, disputants may feel that the mediator or the other party may secretly judge their arguments and behavior.

Although this issue may present a concern for some participants in the mediation process, research indicates that mediation is well equipped to counteract this concern. Three arguments buttress this point. First, at its base, mediation is neutral and impartial.[230] As a result, by definition, mediators do not take positions or evaluate the merits of disputants' facts or arguments. Mediation does not attempt to determine what the mediator thinks about the dispute. Instead, mediation aims "to lead and guide . . . disputants toward a truce."[231] If mediation fails to produce a truce, then sometimes disputants may ask the mediator to offer advice "on what should be done."[232] However, such advice rarely occurs.[233] Commentators note, in fact, that some mediators refuse to offer advice.[234]

Second, mediation does not attempt to establish the facts.[235] By definition, fact-finding implies evaluating or judging. Fact finding, however, does not play a role in the mediation process.[236] In fact, the process does not

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226 *Id.* at 651–52.

227 *Id.* at 652; Greene, *supra* note 22, at 681.

228 Weckstein, *supra* note 31, at 509.

229 JASPER, *supra* note 4, at 23.

230 *See id.*

231 ZEIGLER, JR., *supra* note 37, at 13.

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 *Id.*

generally employ witnesses to prove or establish facts.[237] "Fact-finding is the role of the evidentiary process in court or in arbitration . . . ."[238] Unlike litigation and arbitration, mediation "looks to the present and to the future."[239] Taking a more proactive approach, it asks the following question: "What could now be done that would be better than continuing with this dispute?"[240]

Finally, although judges or arbitrators may assess fault, skilled mediators and the final agreement disputants reach through mediation neither account for nor assess fault.[241] Commentators stress that "[m]ediation is only a structured, assisted process to bring the dispute to an end, not to declare winners or losers."[242] Consequently, judging or evaluating the disputants' arguments and behavior extends beyond the scope of the mediator's responsibilities.

### c. *The Proactive Nature of Mediation*

Finally, as noted earlier, mediating estate planning issues before actual disputes arise requires a proactive approach. Being proactive in estate planning matters that involve wills and trusts, for example, may discourage a testator from mediating for two reasons. Mediation may remind the testator of her inevitable death and possible disharmony that may result among beneficiaries if she opens her will to the mediation process.

#### i. *Reminder of Mortality*

Common sense and experience teach that being reminded of one's morality is not a comforting or pleasant experience. Although mediation reminds a testator of her morality, by providing the testator and beneficiaries with a means to estate plan effectively, mediation promotes responsibility and accountability. Mediation empowers testators and beneficiaries to take control over issues, such as the division of wealth, that may disturb peace and harmony between beneficiaries.

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237 *Id.*
238 *Id.*
239 *Id.*
240 *Id.*
241 *Id.*
242 *Id.*

### ii. *Reminder of Possible Disharmony Resulting from Mediation*

Although mediating a will or trust before a testator dies may create tension between beneficiaries, mediating such matters also enables the testator to address—and perhaps resolve—conflicts that may have resulted after her death. If the testator had chosen to ignore these potential conflicts by not addressing them during her lifetime, then she may have missed a unique opportunity to satisfy her beneficiaries' interests and preserve relationships between beneficiaries after her death.[243] Mediation gives the testator a chance to confront such issues during her lifetime.

## V. CONCLUSION

Commentators stress that since mediation operates as little more "than a structured, professionally-guided negotiation, [it is] clear that anything that could be negotiated could also be mediated."[244] Though information that pertains to mediating estate planning issues before disputes arise is limited, existing research suggests that mediating such issues is not only possible, but also a natural extension of the mediation process.

Although potential problems, such as grief and imbalances of power, create challenges for mediating estate planning issues, in many cases these problems do not present insurmountable obstacles for mediation. As demonstrated earlier, a skilled mediator can often circumvent problems such as grief and imbalances of power by leveling the playing field[245] or delaying the mediation process.[246]

Apart from addressing problems such as grief and imbalances of power, mediation provides more benefits to parties with estate planning issues than emotionally and financially draconian alternatives such as litigation and arbitration. As previously noted, mediation preserves the privacy and confidentiality of proceedings,[247] provides a less formal environment than litigation,[248] encourages parties to communicate actively,[249] resolves disputes

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[243] The author recognizes that, even if a testator mediates an estate planning dispute during her lifetime, the process still may not allow her to satisfy her beneficiaries' interests or maintain peace and harmony between the beneficiaries after her death.

[244] ZEIGLER, JR., *supra* note 37, at 15.

[245] Greene, *supra* note 22, at 682.

[246] Gary, *supra* note 4, at 432.

[247] ZEIGLER, JR., *supra* note 37, at 25; Gary, *supra* note 4, at 424–25; Donahue & Tregub, *supra* note 5, at 651.

[248] JASPER, *supra* note 4, at 23; Donahue & Tregub, *supra* note 5, at 650–51.

[249] *See* Donahue & Tregub, *supra* note 5, at 651.

faster than litigation[250] and arbitration,[251] and provides emotional benefits.[252] It also educates disputants about their cases,[253] reduces stress levels,[254] preserves longstanding relationships,[255] and acts as a preemptive strike against potentially costly litigation.[256]

Finally, mediation may teach parties how to communicate with each other more effectively, offers a high compliance rates,[257] and provides settlements that tend to endure.[258] Perhaps more importantly, mediation empowers parties to create unique, tailor-made solutions to their problems.[259]

Combined, these benefits offer parties with estate planning issues powerful incentives to mediate before disputes arise. On balance, the benefits of mediation simply outweigh most potential problems that arise from mediating estate planning issues.

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250 ZEIGLER, JR., *supra* note 37, at 25.

251 Donahue & Tregub, *supra* note 5, at 651.

252 *See, e.g.*, Gary, *supra* note 4, at 426.

253 Donahue & Tregub, *supra* note 5, at 651–52.

254 ZEIGLER, JR., *supra* note 37, at 26.

255 *See* Donahue & Tregub, *supra* note 5, at 652.

256 Greene, *supra* note 22, at 681.

257 *See* The Mediation & Information Resource Center, *supra* note 23, *at* http://www.mediate.com/articles/benefits.cfm.

258 *See id.*

259 Greene, *supra* note 22, at 681.